86-914

NO.

Supreme Court, U.S.
FILED
NOV 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

C. F. BEAN CORPORATION

Petitioner,

versus

DRAGADOS, et al.

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BALDWIN & HASPEL
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60pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court improperly applied the principal of collateral estoppel to the final decision of a tribunal of the Department of Admiralty of the Government of Mexico.

2. Does the decision of the Ninth Circuit Court of Appeal assessing attorney's fees based upon a frivolous appeal constitute a distortion of the findings of fact by the trial court.

3. Whether the Ninth Circuit Court of Appeal misunderstood the lack of record citations in the original appeal since the undersigned facts, i.e., those found by the District Court in its finding of facts, were deliberately used to avoid a search of the record. American National Insurance Company (ANICO) could not have been found to agree with the distribution based upon the Trial Court's record.

LISTING OF ALL PARTIES TO THE PROCEEDING PURSUANT TO RULE 28.1

1. Dragados, SA
2. Cal-Surance Associates, Inc.
3. B.R. Dredging Company, Inc. and its successor, C. F. Bean Corporation
4. American National Insurance Company
5. John Mostellar
6. J. Manson Murray
7. Donald Martin
8. Vickers, Riis, Murray & Curran
9. Donald H. Mehlig
10. William C. Peters

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

DRAGADOS, S.A.
Plaintiff/Appellee

versus

CAL-SURANCE ASSOCIATES, INC., etc., et al.
Defendants/Appellees/Cross-Appellants

CAL-SURANCE ASSOCIATES, INC., etc., et al.
Defendants/Third-Party-Plaintiffs/
Appellees/Cross-Appellants,

versus

C. F. BEAN CORPORATION and
VICKERS, RIIS, MURRAY & CURRAN,
a partnership et al.
Third-Party Defendants/Appellants

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the judgnment and opinion of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on August 19, 1986.

OPINIONS BELOW

The Memorandum Opinion (unpublished) of the

Court of Appeals is reproduced as Appendix "A" to this Petition.

The Judgment and Findings of Fact and Conclusions of Law of the District Court are reproduced as Appendices "B"and "C", respectively, to this Petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on August 19, 1986. This Petition is timely filed pursuant to 28 U.S.C. § 2101 § 2101(c), as enlarged by this Court.

STATEMENT OF THE CASE

This case presents the question of whether the District Court improperly applied the principle of collateral estoppel to the final decision of a tribunal of the Department of Admiralty of the Government of Mexico.

The *undisputed* findings reflect the following story which underlies this litigation. Plaintiff in the District Court ("Dragados") is a Mexican dredging company. Dragados entered into a written contract for the purchase of a dredge (the "*Long*") from an American dredging company ("BR/Bean", Petitioner here). The purchase price was $1,200,000 of which Dragados paid $80,000 as a deposit. Prior to the time Dragados and BR/Bean entered into the contract and at all time thereafter up to the sinking of the *Long*, the *Long* was subject to a first preferred ship mortgage ("Fleet mortgage") given by BR/Bean to American National Insurance Company ("ANICO"). The mortgage

covered several of BR/Bean's vessels and was used as the basis of an ongoing line of credit between BR/Bean and ANICO. The mortgage required BR/Bean to maintain insurance on the fleet with ANICO as a named insured.

The contract of sale contemplated that the *Long* first would be towed from the last place of use by BR/Bean, across the high seas, to the place where Dragados intended to use it. The contract also provided that title would not pass from BR/Bean to Dragados until the trip was complete.

Prior to the tow, Dragados and BR/Bean agreed to obtain a policy of insurance for $1,500,000 to cover the *Long* during the tow and to lists Dragados, BR/Bean and ANICO as named insureds ("as their interest may appear"). It is the proceeds of this POLICY which were the subject of the litigation below.

The *Long*'s journey was never completed and, literally within sight of its desstination, the *Long* sank during a storm. Thus, under the contract, title did not pass from BR/Bean to Dragados and, after the sinking, Dragados cancelled the contract of sale.

Also after the sinking, the Department of the Admiralty of the Mexican Government began quasi-judicial proceedings to determine ownership of the wreck and, thus determine who was to be responsible for the coast of removing the wreck which was obstructing a navigable channel (see Finding of Fact number 33, Appendix "C"). Dragados denied any ownership interest in the *Long* in order to avoid liability to the Mexican Government for the cost of the wreck removal. Indeed, Dragados deliberately delayed

asserting its claim to a portion of the insurance proceeds until the proceedings before the Department of Admiralty of the Government of Mexico had been concluded. Dragados' sole motive for this delay was to avoid being subjected to a claim in the Mexican proceedings that its assertion in a United States District Court of an interest in the insurance proceeds was inconsistent with its denial of any ownership interest in the Mexican proceeding. Finding of Fact number 66 is set forth here in full:

> Dragados made no claim upon defendants Cal-Surance Associates, Inc., Cal-Surance overseas Agency, Inc. or Martin for payment of the insurance proceeds until September 24, 1986. Dragados' delay in pursuing its rights was deliberate and was motivated by its desire to avoid liability to the Mexican government for the costs of removing the *Long* from the Bay at Puerto Madero.

See also Conclusion of Law number 15 which states in part:

> While delay for the purpose of avoiding liability to the Mexican government may be understandable, the Court does not believe that it constitutes a legally satisfactory excuse for the delay. (Conclusions of Law, page 23, line 24 - page 24, line 1).

The insurance proceeds were then paid to the broker which had originally obtained the policy (Cal-Surance, defendant and third-party-plaintiff). After receiving a letter from BR/Bean's attorney asserting on behalf of BR/Bean and ANICO their claim to the entire $1,500,000

proceeds, Cal-Surance ultimately decided to disburse the entire proceeds to ANICO which, in turn, directed Cal-Surance to pay approximately half the proceeds to BR/Bean as part of its ongoing line of credit with ANICO.

Dragados then filed its Complaint below against Cal-Surance who, in turn, brought a Third Party Complaint seeking indemnity from BR/Bean, from ANICO, and also from the attorney who had authorized the letter claiming entitlement by BR/Bean and ANICO to 100% of the proceeds ("Vickers/Murray," third-party defendant). Vickers/Murray, in turn, filed its Third-Party-Complaint seeking indemnity from Dragados, BR/Bean and ANICO.

As part of the proceedings below, BR/Bean brought a counter-claim against Dragados, seeking equitable contribution for Dragados' portion off the costs of wreck removal which had been assessed against BR/Bean by the Mexican government. In effect, BR/Bean argued that, if Dragados had an interest sufficient to entitled it to participate in a portion of the insurance proceeds, it had, in equity, sufficient interest to require it to participate in the costs of the wreck removal. After all, Dragados' insurable interest had to be removed, at Bean's expense, while Dragados deliberately waited to file suit in Los Angeles.

After trial of the principal action, the District Court entered judgment in favor of Dragados and against Cal-Surance on the underlying Complaint. It then entered judgment for indemnity in favor of Cal-Surance and against BR/Bean and Vickers/Murray (but not against ANICO) and, again in turn, entered judgment for indemnity in favor of Vickers/Murray and against BR/Bean (but not ANICO). Therefore, the full weight of the District Court's decision

that the three named insureds agreed that Dragados was to receive $300,000 of the $1,500,000 proceeds has fallen upon BR/Bean.

BR/Bean's counter-claim was severed and disposed of by the District Court on motion for summary judgment made by Dragados. It was in ruling on this motion for summary judgment that petitioner believes the District Court improperly applied the principles of collateral estoppel. (The Findings of Fact and Conclusions of Law [unsigned] of the District Court follow as Appendix "D"). It is clear that the District Court believed that, because the Mexican proceedings had determined that BR/Bean was the owner of the *Long* and, therefore, responsible for its wreck removal costs, the District Court did not reach the necessary correlative conclusion, i.e. that, because the Mexican tribunal had concluded that Dragados did *not* have an ownership interest, Dragados was not entitled to any of the insurance proceeds. Dragados cannot have it both ways, which is what the Trial Court has done.

Although the appeal to the Ninth Circuit Court of Appeals was primarily predicated upon a different issue (i.e., whether or not the critical Finding of Fact regarding the intention of ANICO as one of the three named insureds was supported by substantial evidence), petitioner did raise the question of Dragados' inconsistent position to the Court of Appeals in its Reply Brief as follows:

> Finally, at Finding number 66, the District Court specifically found that Dragados was guilty of manipulating the timing of its claim so as to avoid exposing itself to potential liability for the costs of removal of the wreck. In other words,

> Dragados was clearly aware of the loss of the "*Long*" and of the insurance proceeds which were payable as a result of that loss. Had Dragados promptly come forward upon the sinking, the respective claims of the named insureds could have been resolved before any of the proceeds were distributed. Rather, and in order to escape its obligation to pay the Mexican government for the costs of removing the wreck, Dragados deliberately remained silent until BR/Bean had paid for those wreck removal costs.

The Ninth Circuit did not comment on this contention.

ARGUMENT

COLLATERAL ESTOPPEL

The District Court only partially applied the doctrine of collateral estoppel. When the *Long* sank in 1973, there was a complicated contract for the purchase of the dredge between plaintiff's predecessor, BR Dredging, and Dragados. The District Court specifically found that the trip insurance was increased to protect the interests of Dragados for its "value added" to the *Long*. These insurance proceeds are at the center of the case.

Unfortunately, the *Long* sank right in the middle of the channel it was dredging. Naturally, the Mexican Marina looked for someone to be responsible for the cost of the wreck removal.

Dragados promptly distanced themselves from this potential liability by disclaiming any responsibility and, in

a proceeding before the Mexican Marina it was determined that petitioner was solely responsible for the cost of the wreck removal.

In the "value added" theory, Dragados should have had 20% of the total wreck removal cost, or 20% of 12,500,000 Mexican pesos.

The District Court found that the finding of the Mexican Court constituted a collateral estoppel and therefore found that Dragados should bear no cost of the wreck removal.

This is patently inconsistent with the District Court's finding that Dragados was entitled to $300,000 of the "value added" to the *Long* before its voyage. The District Court erred in not setting off 20% of the wreck removal cost as a contribution to petitioner and as an equitable setoff to the $300,000 judgment awarded to Dragados. The District Court cannot pick and choose what part of the Mexican decision which to determine is applicable. The factual finding by the Mexican Court was that Dragados was not responsible for anything because they owed nothing. The District Court failed to continue the factual findings of the Mexican Court to their logical intellectual conclusions, *i.e.*,Dragados owned $300,000 of the Dredge and should pay 20% of the wreck removal costs. *Dennis v. R. I. Hosp. Trusts National Bank,* 744 F. 2d 893 (1st Cir. 1984) Either Dragados owned no interests in the *Long,* or Dragados owned an insurable interest of $300,000 as well as its portion of the wreck removal cost. After all, the District Court found that Dragados had purposely delayed its suit before the District Court in Los Angeles until the Mexican Court had decided the question of wreck removal. This is patently bad faith and the District Court

denying Dragados certain interest.

THE FRIVOLOUS APPEAL

In the proceedings before the District Court, there were numerous issues including contract, admiralty, international law and legal malpractice. The District Judge took approximately three years in rendering its decision following the close of the trial. The District Judge described to the parties that this was a very troublesome case. The court's decision so indicates.

In appealing primarily on the relatively narrow issue of the consent of the mortgage holder, a conscious decision was made not to confuse all of the multitudinous issues. The case is cited by the Ninth Circuit as authority, *DeWitt v. Western Pacific RR Co.*, 719 F.2d 1448 (9th Cir. 1983) for finding that the appeal was frivolous is inapplicable to the type of case at bar. Accordingly, the Ninth Circuit Court of Appeal's finding that costs and attorney's fees should be awarded for a frivolous appeal should be reversed as being contrary to the purpose of the Federal Rules of Appellate Procedure No. 28. See and compare *Dow Chemical Co. v. M/V Gulf Seas* 593 F.2d 613 (5th Cir. 1979) and *Sloan v. SEC* 535 F.2d 676, (2d Cir. 1976), *cert. denied 429 U.S. 885 (1977)*

THE ANICO CONSENT

The case cited as authority for the proposition that "the loss-payable clause of the policy may be construed as requiring a division in proportion to the respective irrevocable interest . . . ." *Welsh v. Tadlock,* 1014 F.2d 1313, 132 (9th Cir.), *cert. denied,* 308 U.S. 584 (1939) is initially

of interest simply because it was interpleader. If the matter at hand had been handled in that manner by Cal-Surance Associates, Inc. rather than simply paying based on the opinion of B.R.'s Mobile counsel, Mr. Murray, then none of this litigation would have reached this status, thirteen years after the loss of the Long.

The Court in *Walsh* had the advantage of a full record of the *intent* of all parties. in its decision, the Ninth Circuit found ANICO's intent to be irrelevant. It is submitted that the absence of ANICO's intent from the Trial Court and commented upon by the District Court with concern is the exact reason that all claims should be dismissed since ANICO's dismissal is final.

Although there is a 60(B) motion under the Federal Court on the question of consequential damages, it is important to understand the context in which the insurance payment was made to BR/Bean and ANICO. The judgment as it stands has attorney fees and interest greater than the $300,000 principal. The District Court's rationale in its simplest terms is that BR/Bean got the $300,000 it should not have received. Therefore it has to pay interest for use of the money as well as Cal-Surance attorney fees before the District Court. During the entire proceeding from 1973 through the trial on the merits, Cal-Surance and Manson Murray, BR's attorney, defended their actions. None of them told C. F. Bean that a serious error had been made concerning the $300,000.

The trial court at its Findings of Fact Numbers 20, 25, 31, 39, 42, 43, 44, 49, 60, 63 and its Conclusions of Law Number 28, painted a picture of malfeasance by Cal-Suarnce and Manson Murray. Clearly, both should, and in

fact, did know better. The situation begged for an interpleader - but to no avail. Bean was left to pick up the pieces with disastrous interest and attorney fees. If the decision of the Trial Court is left intact, then Cal-Surance, Murray, and even Dragados will walk away from a proceeding in which all three had been found to have been either bad faith or professional error. C. F. Bean's only error was in believing Cal-Surance and Murray who said the $300,000 was theirs. The equitable division of responsibility for these debts if the Decisions of the District Court on the merits of the $300,000 is left intact is as follows:

(1) All interest from 1976 to March 29, 1985 be borne jointly and severally by Cal-Surance and Murray;

(2) All attorney fees by C. F. Bean from 1976 through March 29, 1985 be borne jointly and severally by Cal-Surance and Murray;

(3) The $300,000 be paid to Dragados minus its share of the wreck removal. Interest on both amounts should be included;

(4) All parties to bear their own cost and attorney fees unless otherwise provided for.

CONCLUSION

The finding of the District Court was that all of the parties to this litigation exhibited bad faith or committed malpractice except petitioner. This includes the insurance company and its agent, the plaintiff, as well as counsel for petitioner's predecessor. (There is currently a motion under Rule 60(B) of the Federal Rules of Civil Procedure pending

before the District Court concerning the question of Mr. Murray's malpratice.) If the theory of the District Court holds true that petitioner improperly received $300,000 in insurance proceeds, the finding that it was not in bad faith is still outstanding. Conversely, the finding that the plaintiff *is* in bad faith would strongly argue that the District Court misapplied the doctrine of collateral estoppel by only applying a portion of the finding of the Mexican Court concerning Dragados' interest in the question of wreck removal.

For these reasons, a writ should issue and in the pendency of this writ a stay should be maintained.

Respectfully submitted:

BALDWIN & HASPEL:
JEROME J. RESO, JR.
H. SLOAN McCLOSKEY
Attorneys for C.F. Bean
Corporation

CERTIFICATE OF SERVICE

I, H. SLOAN McCLOSKY, hereby certify that I have on November 25, 1986, by United States Mail, postage prepaid, served a copy of the foregoing Petition for Writ of Certiorari upon all parties required to be served, their names and adresses being as follows:

Robert L. Wilson, Esq.
Wilson, Kenna & Borys
11075 Santa Monica Boulevard, 3rd Floor
Los Angeles, California 90025

Fletcher W. Paddison, Esq.
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, California 92101 - 3599

Richard F. Oetting, Esq.
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Los Angeles, California 90071 -1599

James B. Bertero
Musick, Peeler & Garrett
1 Wilshire Boulevard
Los Angeles, California 90017

_____

H. SLOAN McCLOSKEY

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed Aug 19 1986

DRAGADOS, S. A.,	)	NOS. 85-5840
Plaintiff-Appellee,	)	85-5860
	)	85-5890
vs.	)	85-6086
CAL-SURANCE ASSOCIATION,	)	DC# CV
INC, et al.,	)	77-4081-MRP
Defendants/Third-Party	)	
Plaintiff/Appellees,	)	MEMORANDUM*
vs.	)	
C. F. BEAN CORPORATION,	)	
Third-Party Defendant/	)	
Appellant.	)	

Appeal from the United States District Court
for the Central District of California
Honorable Mariana R. Pfaelzer, District Judge, Presiding
Argued and Submitted June 5, 1986

Before: GOODWIN, TANG and FLETCHER, Circuit Judges.

Third-Party Defendant, C. F. Bean Corp. (Bean) appeals the judgment of the district court holding that Dragados is entitled to a portion of the insurance proceeds which Cal-Surance improperly paid to B. R. Dredging[1] and

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

[1] Appellant C. F. Bean Corp. is a successor-in-interest to B.R. Dredging.

American National Insurance Company (ANICO). We affirm.

Substantial evidence existed to support the district court's findings. Dragados had agreed to purchase the dredge "Russell E. Long" (Long) from B. R. Dredging. The parties purchased an insurance policy to cover the Long's journey from seller to buyer. Dragados, B. R. Dredging and ANICO (B. R. Dredging's mortgagee) were named as the insureds in the contract.

In the absence of a showing of a party's intent regarding the distribution of proceeds to the named payees, "the loss-payable clause of the policy may be construed as requiring a division in proportion to the respective insurable interest . . . ." *Walsh v. Tadlock*, 104 F.2d 131, 132 (9th Cir.), *cert. denied*, 308 U.S. 584 (1939). The district court's finding that Dragados and B.R. Dredging agreed to obtain tow insurance and further agreed that the $1.5 million coverage, a $300,000 increase over existing coverage, would protect Dragados' repair work investment in the Long is not clearly erroneous.

ANICO's intent is irrelevant. ANICO did not participate or otherwise involve itself in the purchase of the tow insurance policy. Under the mortgage contract, B.R. Dredging was obligated to purchase and maintain fleet insurance and list ANICO as a named insured. As long as ANICO's interest in the collateral was protected, which it was throughout this transaction, ANICO would not be concerned with an increased liability coverage designed to protect interest of a third party.

We find this appeal frivolous. Bean makes no serious attempt to point to evidence in the record, or lack thereof, that would undermine the district court's findings. *See DeWitt v. Western Pacific Railroad Co.*, 719 F.2d 1448, 1451 (9th Cir. 1983). Further, Bean raises no issues on its appeal in No. 85-6086. We therefore award single costs and fees to all parties whose presence was necessitated by this appeal.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Filed MAR 29 1985

DRAGADOS, S. A.,	CASE NO.
Plaintiff-Appellee,	CV 77-4081
vs.	MRP
CAL-SURANCE ASSOCIATION, INC, etc., et al.,	JUDGMENT
Defendants.	ON COMPLAINT
	AND THIRD
AND RELATED CROSS-ACTIONS.	PARTY
	COMPLAINTS

This action came on for trial on March 2, 3, 4, 5, 9, 10, 11, 12, 16 and 17, 1982, before the Honorable Mariana R. Pfaelzer, District Judge. The Court tried the following matters:

1. The Complaint by Dragados, S. A., plaintiff, against Cal-Surance Associates, Inc., a California corporation, Cal-Surance Overseas Agency, Inc., a California corporation, Donald A. Martin, Robert N. Antenucci, Donald H. Mehlig and William C. Peters;

2. The Third Party Complaint filed by third party plaintiffs Cal-Surance Overseas Agency, Inc., a California corporation, Cal-Surance Associates, Inc., a California corporation, Donald E. Martin, Donald H. Mehlig and William C. Peters, against third party defendants Vickers, Riis, Murray & Curran, a partnership, J. Manson Murray, C. F. Bean Corporation, a corporation, and American National Insurance Company, a corporation;

3. The Third Party Complaint by third party plaintiffs Vickers, Riis, Murray & Curran, a partnership, and J.

Manson Murray against third party defendants Dragos, S. A., C. F. Bean Corporation and American National Insurance Company. Based upon the Complaint, the Third Party Companies, the pleadings and papers on file herein, the oral and documentary testimony admitted at trial, and the Findings of Fact and Conclsions of Law filed herein.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Judgment be entered on the Complaint in favor of plaintiff Dragados, S.A., and against defendants Cal-Surance Associates, Inc., Cal-Surance Overseas Agency, Inc. and Donald A. Martin in the amount of $298,343.80;

2. Dragados be awarded re-judgment interest which shall constitute part of the judgment from November 18, 1976 through March 29, 1985, at the rate and in the manner set forth on Exhibit "A", totaling $380,593.39, for a total award of $678,637.19;

3. Dragados be awarded its costs of suit;

4. Judgment be entered in favor of defendants Robert Antenucci, Donald Mehlig and William C. Peters and these defendants be awarded their costs of suit;

5. Judgment be entered on the Third Party Complaint in favor of Cal-Surance Overseas Agency, Inc., Cal-Surance Associates, Inc. and Donald E. Martin and against Vickers, Riis, Murray & Curran, J. Manson Murray and C. F. Bean Corporation for the full amount of the judgment against these defendants and third party plaintiffs in favor of Dragados, S. A., as set forth in paragraphs 1 through 3 above;

6. Third party plaintiffs Cal-Surance Overseas Agency, Inc., Cal-Surance Associates, Inc. and Donald E. Martin be awarded their attorney fees and costs of suit against the firm of Vickers, Riis, Murray & Curran and J. Manson Murray. Third party plaintiffs shall file with the Court their application for attorney fees within ten days of the date of this Judgment;

7. Judgment be entered in favor of American National Insurance Company against third party plaintiffs and American National Insurance Company be awarded its costs of suit against Cal-Surance Overseas Agency, Inc., Cal-Surance Associates, Inc. and Donald E. Martin;

8. Judgment be entered on the separate Third Party Complaint in favor of the firm of Vickers, Riis, Murray & Curran and J. Manson Murray and against C.F. Bean Corporation for the full amount of the judgment against Vickers, Riis, Murray & Curran and J. Manson Murray in favor of Cal-Surance Overseas Agency, Inc., Cal-Surance Associates, Inc. and Donald E. Martin as set forth in paragraph 5 above;

9. Vickers, Riis, Murray & Curran and J. Manson Murray be awarded their costs of suit against C.F. Bean Corporation;

10. Judgment be entered in favor of Dragados, S.A. and American National Insurance Company on the separate Third Party Complaint and these third party defendants be awarded their costs of suit against Vickers, Riis, Murray & Curran and J. Manson Muray.

DATED /s/ MARCH 29, 1985

/s/ Mariana R. Pfaelzer

Mariana R. Pfaelzer

PREJUDGMENT INTEREST
Dragados

Interest	Issuance Date and Coupon Issue Yield Rate 28 USC § 1961]	Annual Interest	Total (Year End)
11-18-76 through 11-17-77	11-15-76 5.49% x $298,043.80=	$ 16,362.60	$298,043.80 + 16,362.60 $314,406.40
11-18-77 through 11-17-78	11-15-77 6.98% x $314,406.40=	$ 21,945.57	$314,406.40 + 21,945.57 $336,351.97
11-18-78 through 11-17-79	11-14-78 10.17% x $336,351.97=	$ 34,207.00	$336,351.97 + 34,207.00 $370,558.97
11-18-79 through 11-17-80	11-13-79 13.18% x $370,558.97=	$ 48,839.67	$370,558.97 + 48,839.67 $419,398.64
11-18-80 through11-17-81	11-06-80 13.67% x $419,398.64=	$ 57,331.79	$419,398.64 + 57,331.79 $476,730.43

EXHIBIT "A"

A-8

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

	CASE NUMBER
Dragados S.A. PLAINTIFF(S)	CV 7704981 MRP
vs Cal Surance Surance Associates Inc	NOTICE OF ENTRY
DEFENDANT(S)	

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that Judgment on complt & third pty complt in the above entitled case was entered in the docket on 3-29-85 .

You are also notified that if this case tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (After *sixty* days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 29.2. If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

(over)

CERTIFICATE OF MAILING

I, Clerk of the United States District Court, Central District of California, and not a party to the within action, hereby certify that on 4-1-85 , I served a true copy of this motice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelpoes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Joseph Ferguson
503 Whitney Bldg.
New Orleans, Louisiana 70130

Fletcher W. Paddison
One Ten Juniper St.
San Diego, Ca 92101

Jon C. Cederberg
One Wilshire Bovd.
LA CA 90025

Richard Oetting
333 S. Grand Ave
37th Flr
LA CA 90071

CLERK, U.S. DISTRICT COURT
By: /s/ S. Butler
Deputy CLerk

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

CV-26 (10/83)

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Filed MAR 29 1985

DRAGADOS, S. A., Plaintiff, v. CAL-SURANCE ASSOCIATION, INC, etc., et al., Defendants.	CASE NO. CV 77-4081 MRP
AND RELATED CROSS-ACTIONS.	FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on for trial on March 2, 3, 4, 5, 9, 10, 11, 12, 16 and 17, 1982, before the Honorable Mariana R. Pfaelzer, District Judge. The Court, having considered the evidence presented and the arguments of consel, and having taken the case under submission, now issues its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. As of April 2, 1973, B.R. Dredging Company, Inc., a Delaware corporation ("B.R. Dredging") was the owner of the Russell B. Long, a dredge, then located at Lazero Cardenas, Mexico.

2. On or about April 1, 1973, B.R. Dredging entered a Contract of Sale (Exhibit 1) with Dragados S.A. ("Dragados") for the sale of certain dredging and equipment, including the Russell B. Long ("Long"). Dragados is a corporation organized and existing under the laws of Mexico.

3. In the Contract of Sale, the purchase price for the Long was set at $1,200,000.

4. At the time of the Contract of Sale, the Long was not operational. The parties contemplated that Dragados would tow the Long from Lazero Cardenas to Puerto Madero, Mexico, where it would commerce dredging operations. The parties, B.R. Dredging and Dragados, further contemplated that prior to the tow, Dragados would repair the Long, and the other vessels subject to the Contract of Sale, at an estimated cost of $400,000.

5. Pursuant to the terms of the Contract of Sale, Dragados made a down payment of $80,000 in April of 1973.

6. Following the execution of the Contract of Sale, Dragados entered into a contract with the State of Mexico for dredging operations in Puerto Madero, Mexico (Exhibit 5). The profit was in excess of $520,000.

7. As of April 1973, B.R. Dredging had entered into a first preferred ship mortgage, generally known as a "fleet mortgage." with American National Insurance Company, as mortgages, dated November 1, 1972 (Exhibit 613). This fleet mortgage included several vessels owned by B.R. Dredging, including the Long, as collateral. Pursuant to the terms and conditions of this mortgage, B.R. Dredging was required to carry a "fleet policy" of insurance covering the vessels included as collateral, listing American National Insurance Company ("ANICO") as a named insured. ANICO is a corporation duly organized under the laws of the State of Texas.

8. At all times prior to June 1973, the fleet policy maintained by B.R. Dredging included ANICO as a co-insured and listed the insured value of the Long at $1,200,000.

9. A survey of the Long dated April 3, 1973 set the then value of the dredge at $1,200,000.

10. The Long had a fair market value of $1,200,000 as of April 2, 1973.

11. Between April 1973 and July 1973, Dragados transported men and supplies to Lazero Cardenas and commenced repairs upon the Long and the other vessels subject to the Contract of Sale.

12. At this time, it was estimated by Dragados that the cost of repairs and other expenditures with respect to the Long would amount to $300,000.

13. As of April 1973, the existing policy of fleet insurance did not cover a tow of the Long from Lazero Cardenas to Puerto Madero, Mexico, and was limited to $1,200,000 in coverage for that vessel.

14. The Contract of Sale provided that title to the dredge and equipment was not to pass until certain specified events occurred, and that insurance coverage would be maintained on the Long until title passed, with the costs of the insurance to be borne by Dragados.

15. Between April 1973 and June 1973, representatives of B.R. Dredging and Dragados had a series of discussions concerning the insurance required to cover the Long.

16. At one point during these discussions, Dragados intended to obtain a separate "trip policy" covering solely its own interest in the Long. In fact, Dragados later did

obtain a "trip policy" in the amount of $1,500,000 covering Dragados, B.R. Dredging and ANICO's interests during the tow from Lazero Cardenas to Puerto Madero. Dragados also obtained a separate commitment to insure the Long after its arrival at Puerto Madero.

17. Between April and August of 1973, Eli H. Thornston, the attorney for B.R. Dredging, acted as B.R. Dredging's agent in connection with the sale of the Long and the insurance coverage for it.

18. The nature, extent and anticipated cost of the contemplated repairs referred to in Finding No. 12 were known to the officers of B.R. Dredging, and its attorney, Eli H. Thornton, between April 1973 and July 1973.

19. B. R. Dredging and Dragados ultimately decided to obtain a separate policy of insurance on the Long, in the sum of $1,500,000, naming Dragados, B.R. Dredging and ANICO as insureds and extending the navigational limits of the policy to Puerto Madero and the time limits to October 31, 1971. This agreement was confirmed by Thornton's correspondence (Exhibit 18) stating that a policy of hull insurance for $1,500,000 would be ordered by B.R. Dredging as an addition to its existing coverage.

20. Cal-Surance Overseas Agencies, Inc., and Cal-Surance Associates, Inc., corporations organized under the laws of the State of California as insurance brokers, secured a policy of hull insurance, through various underwriters, including Lloyds of London, insuring the Long from July 3, 1973 through October 31, 1973, under Cover Note R.0153/3 (Exhibit 21). The cover note listed as the insureds: "B.R. Dredging, Inc./Dragados S.A. and American

National Ins. Co. as mortgages." The insured value of the Long was $1,500,000.

21. Subsequent to 1973, Cal-Surance Overseas Agencies, Inc., merged into Cal-Surance Associates, Inc., which was the surviving corporation.

22. The issuance of the Cover Note R.0153/3 caused the insured value of the Long to be increased from $1,200,000 to $1,500,000. This increase in value was effective at the request of B.R. Dredging, based upon discussions between Jorge Escalante, president of Dragados, and John Mostellar, vice-president of B.R. Dredging.

23. The intent of the insureds under Cover Note R.0153/3 was that $1,200,000 of the total insured value of the Long covered the interests of ANICO and B.R. Dredging, and that the remaining $300,000 covered the interest of Dragados, thus insuring Dragados against loss of the amount to be expended in repairing the Long.

24. The intent of the insureds under Cover Note R.0153/3 with respect to the insurance proceeds is clearly evidenced by the following facts:

(a) Prior to April 1973, ANICO was included as an insured on the policies covering the Long, with the Long's insured value listed at $1,200,000. ANICO never objected to the insured value in connection with its maritime mortgage. There is no credible evidence that ANICO had any understanding that it was entitled to amounts exceeding $1,200,000 under cover Note R.0153/3.

(b) B.R. Dredging knew of the repairs being

performed by Dragados; these repairs were specifically provided for in the Contract of Sale. Further, B.R. Dredging knew that the estimated repair costs totalled $300,000.

(c) Dragados is named on all policies issued after April 1973. Moreover, Dragados undertook to obtain its own policy of tow insurance, listing the value of the Long at $1,500,000 and listings Dragados as a co-insured, for the express purpose of covering its $300,000 interest in the vessel.

(d) There was no credible evidence that B.R. Dredging ever anticipated making any expeditures on the Long, or that B.R. Dredging or ANICO intended the increased coverage to protect their interests.

(c) Dragados is named on all policies issued after April 1973. Moreover, Dragados undertook to obtain its own policy of tow insurance, listing the value of the Long at $1,500,000 and listing Dragados as a co-insured, for the express purpose of covering its $300,000 interest in the vessel.

(d) There was no credible evidence that B.R. Dredging ever anticipated making any expenditures on the Long, or that B.R. Dredging or ANICO intended the increased coverage to protect their interests.

25. At the time of the issuance of Cover Note R.0153/3, Cal-Surance Associates, Inc., and Cal-Surance Overseas Agencies, Inc., were aware of the Long's prior insured value and at or near that time they were notified that Dragados was performing repairs upon the vessel.

26. Between April 1973 and July 1973, Dragados expended in excess of $194,000 on the repair of the Long. This amount did not include the general operating overhead for Dragados' repair operations at Lazero Cardenas.

27. Commencing in July 1973, the Long was towed from Lazero Cardenas to Puerto Madero, Mexico, where it was to commence dredging operations for Dragados. Upon entry into the bay at Puerto Madero, the dredge was to commence operations and dredge to the high water mark where delivery was to be completed under the Contract of Sale. The dredge commenced its tow in early July 1973, arriving at Puerto Madero prior to August 1, 1973, where it commenced digging a channel through the bay. Prior to reaching the high water mark, the dredge was damaged and became a constructive total loss on August 1, 1973.

28. The Long was declared a constructive total loss as of August 1, 1973, and abandoned by the insureds to the under-writers under Cover Note R. 0153/3..

29. Because the Long was declared a constructive total loss and was never delivered pursuant to the terms and conditions of the Contract of Sale, Dragados terminated the Contract of Sale on October 19, 1973.

30. At the time of the issuance of Cover Note R. 0153/3 and at the time of the loss of the Long, Dragados had an insurable interest in the dredge.

31. Subsequent to the loss, Cal-Surance Overseas Agencies, Inc., and Cal-Surance Associates, Inc., obtained written authorization signed by the three named insureds,

including Dragados, to collect the proceeds of insurance under Cover Note R.0153/3. No written authorization was given to Cal-Surance Overseas Agencies or Cal-Surance Associates, Inc., to disburse the insurance proceeds.

32. Pursuant to this written authorization, Cal-Surance Overseas Agencies and Cal-Surance Associates, Inc., agreed to act as agents for collection of the insurance proceeds for the three named insureds under Cover Note R.0153/3. Cal-Surance Overseas Agencies, Inc., signed a separate written authorization for collection to Rooke, Taylor, Coombe, Ltd.

33. As a result of the damage to the Long on August 1, 1973, it was partially submerged in the Bay of Puerto Madero, Mexico. The Mexican Government therefore demanded that the party legally responsible for the dredge remove it or it would be removed by the Government and the cost thereof imposed upon the responsible party.

34. Discussions between B.R. Dredging and Dragados following the loss of the Long dealt primarily with responsibility for the removal of the dredge and the costs associated therewith.

35. Dragados did not enter into any agreement with B.R. Dredging or ANICO which had the intent or the effect of waiving, abandoning or reliquishing Dragados' interests in the insurance proceeds under Cover Note R.0153/3. Discussions between Charles Crady ("Crady"), the attorney representing Dragados, and J. Manson Murray (sometimes referred to as "Murray"), the attorney representing B.R. Dredging, took place at various times between August and the end of October 1973. Murray

testified that he understood that an agreement was reached with Crady under the terms of which Dragados relinquished or waived its right in the insurance proceeds. Crady denied the existence of such an agreement. The Court finds Crady's testimony credible and that no such agreement existed. Moreover, Crady did not have the apparent or express authority to waive, release or relinquish Dragados' rights under the Cover Note.

36. The underwriters under Cover Note R. 0153/3 made full payment of the loss, less the aggregate deductible, between November 1, 1973 and December 1973. The amount of the payment was $1,500,00, less the aggregate deductible of $9,781, a total of $1,490,119. In addition, a collection commission of $5,000 was taken and divided by Rooke, Taylor Coombe, Ltd., and Cal-Surance Overseas Agencies, Ltd.

37. Payment by the Underwriters was made pursuant to the written authorization of the insureds, B.R. Dredging, Dragados and ANICO, to Cal-Surance Overseas Agencies, Inc., and the separate written authorization of Cal-Surance Overseas Agencies, Inc., to Rooke, Taylor, Coombe, Ltd. (Exhibits 29 and 30).

38. Payment under Cover Note R.0153/3 was made to, and received by, Cal-Surance Associates, Inc., and Cal-Surance Overseas Agencies, Inc., on behalf of the insureds.

39. Between August 2, 1973 and July 1976, no representative, agent or employee of Cal-Surance Associates, Inc. or Cal-Surance Overseas notified Dragados of the collection, receipt or disbursment of the insurance proceeds paid under Cover Note R.0153/3.

40. Cal-Surance Associates, Inc. and Cal-Surance Overseas Agencies, Inc. made payment of all of the proceeds of insurance, less commission, to B.R. Dredging and ANICO, commencing October 31, 1973 through December 26, 1973. (Exhibits 68 and 72)

41. Donald Martin ("Martin") was the chief executive officer of Cal-Surance Associates, Inc. and Cal-Surance Overseas Agencies, Inc., and he supervised the collection and the disbursement of proceeds under Cover Note R.0153/3,

42. At the time of the initial disbursement of the insurance proceeds on or about October 31, 1973, Cal-Surance Overseas Agencies, Inc., Cal-Surance Associates, Inc. and Martin knew that Dragados had an insuable interest in the vessel and that Dragados was legally entitled to receive $300,000 of the proceeds. (Exhibits 56 & 57) They also knew that Dragados had signed the collection authority as a named insured and that it was improper to make payment to B.R. Dredging unless they had instructions from a representative of Dragados to do so. They nevertheless made a distribution of $839,127.41 solely to B-R Dredging.

43. In late October and early November of 1973, Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. (sometimes referred to as ("Cal-Surance") and Martin were contacted by B.R. Dredging, who made demand for all of the proceeds to be paid to B.R. Dredging and ANICO. The principal reason advanced by B-R Dredging for excluding Dragados from any share in the insurance proceeds was that Dragados had defaulted on the purchase agreement for the Long and therefore no longer had any

insurable interest in it. (Exhibit 58) Following these conversations, Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin requested an opinion letter from B.R. Dredging's attorneys that it was "right and proper" to distribute the proceeds solely to B.R. Dredging and ANICO.

44. B.R. Dredging requested its attorney, Vicker, Riis, Murray & Curran by J. Manson Murray, to render an opinion to Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin that it was "right and proper" to make payment solely to B.R. Dredging and ANICO. Pursuant to this request, on November 12, 1973, J. Manson Murray of Vickers, Riis, Murray & Curran stated in writing to Cal-Surance Overseas Agencies, Inc. and Cal-Surance Associates, Inc. that B-R Dredging had "reached an understanding" with Dragados to deliver the insurance proceeds to ANICO and that B-R Dredgidng and ANICO had agreed as to the ultimate disposition of the proceeds. On that basis, Mr. Murray opined that it would be "right and proper" to distribute the insurance proceeds under the Cover Note 0.153/3 solely to B.R. Dredging and ANICO (Exhibit 77). At the time Mr. Murray wrote the letter of November 12, 1973, he had no reasonable factual basis for making the statement that B-R Dredging and Dragados had reached an understanding that the insurance proceeds were to be delivered to ANICO. Dragados had reached no such understanding with B-R Dredging nor had Dragados at any time ever relinquished its claim to its share of the insurance proceeds. At the very least, Mr. Murray negligently represented to Cal-Surance Overseas Agencies, Inc. and Cal-Surance Associates, Inc . and Martin that Dragados had reached such an understanding with B-R Dredging. Further, Mr. Murry was negligent in rendering

the opinion contained in his November 12, 1973 letter. If Mr. Murray had made a reasonably adequate investigation of the law and the facts, he would necessarily have concluded that Dragados was entitled to a share of the insurance proceeds and that it had never relinquished its claim of entitlement to that share.

45. Vickers, Riis, Murray and Curran ("the Vickers firm") was and now is a law partnership with its offices located at Mobile, Alabama. J. Manson Murray was and now is an attorney at law duly licensed to practice in the State of Alabama, and at all times from 1973 to the present was a partner in the Vickers firm. At all relevant times, Murray was acting as attorney for B.R. Dredging.

46. In rendering his opinion, Murray failed to exercise that degree of skill, prudence and diligence which commercial lawyers of ordinary skill and capacity in large city practices in his area commonly possess and exercise.

47. Murray's opinion was rendered for the purpose of influencing the conduct of Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin, and they relied upon that opinion in distributing the insurance proceeds to B.R. Dredging and ANICO.

48. Cal-Surance Overseas Agencies, Inc. and Cal-Surance Associates, Inc. made the first distribution of insurance proceeds prior to receipt of the opinion letter from Murray. However, the bulk of the proceeds, certainly an amount greatly in excess of the amount to which Dragados was entitled as its share, were paid to B.R. Dredging and ANICO after receipt of the opinion letter.

49. As this finding relates the claims of Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin against Murray and the Vickers firm only, and not with respect to Dragados' claims against Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin, those entities and Martin justifiably relied on the statements made by Murray, and the legal opinion given in his November 12, 1973 letter, in distributing the proceeds of the policy. Such reliance did not, of course, relieve Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin of their duties and obligations to Dragados nor did it relieve them of liability to Dragados for the improper disbursement of Dragados' portion of the insurance proceeds.

50. Dragados learned that payment in full of the insurance proceeds had been made to B.R. Dredging in February of 1974, following review by Jorge Escalante of an article in a magazine and a telephone conversation between Escalante and a representative of B.R. Dredging.

51. B.R. Dredging has been merged into Bean Contracting Company, a corporation existing under the laws of the State of Louisiana. Bean Contracting Company was thereafter merged into C.F. Bean Corporation, a Louisiana corporation ("Bean"), the successor-in-interest to the assets and liabilities of B.R. Dredging, including the assets and liabilities involved in the instant action.

52. Bean is the holder of the insurance proceeds released by Cal-Surance Ovcerseas Agencies, Inc. and Cal-Surance Associates, Inc.

53. Cal-Surance Overseas Agencies, Inc. and Cal-

Surance Associates, Inc. retained none of the proceeds of the insurance covering the "Long".

54. Donald H. Mehlig and William C. Peters were officers of Cal-Surance and, at all times relevant hereto, acted within the course and scope of their employment with Cal-Surance. They did not directly participate in any of the acts or omissions of Cal-Surance or Martin involving Dragados or the disbursement of the insurance proceeds.

55. Neither Murray nor Vickers, Riis, Murray and Curran received any of the insurance proceeds under Cover Note R.0153/3.

56. Termination of the Contract of Sale by Dragados, following the loss of the Long, did not affect the interest of Dragados in the insurance proceeds under Cover Note R.0153/3.

57. Dragados was legally entitled to receive $300,000 of the $1,500,000 in insurance proceeds payable upon total loss of the Long.

58. The amounts due Dragados were due and payable December 26, 1973, the date of the last payment by Cal-Surance to B.R. Dredging and ANICO.

59. Cal-Surance Overseas Agencies, Inc., Cal-Surance Associates, Inc. and Martin acted as agents for collection in collecting the proceeds payable under the Cover Note R.0153/3 and acted as the agents for the three named insureds, Dragados, B.R. Dredging and ANICO, pursuant to their written authority (Exhibits 29 and 30).

60. Cal-Surance Overseas Agencies, Inc., Cal-Surance Associates, Inc. and Martin knew that following the loss of the Long, B.R. Dredging's interests were adverse to Dragados.

61. Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin:

(a) Failed to notify Dragados of the receipt of insurance proceeds;

(b) Failed to request or await instructions from dragados prior to disbursing the proceeds;

(c) Disbursed the insurance proceeds without the authorization, permission or consent of Dragados;

(d) Failed to make an accounting to Dragados; and

(e) Failed to exercise loyalty to Dragados in making payment to B.R. Dredging after they were aware of the adverse interests between the parties.

62. Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin failed to collect and distribute the insurance proceeds in accordance with the instructions of Dragados, and account fully for the same.

63. Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Donald Martin interfered with Dragados' right to possession of the proceeds in making payment to B.R. Dredging and ANICO without the permission, consent or authorization of Dragados.

64. Based upon the intention of the parties, Dragados had a $300,000 interest in the proceeds of $1,500,000. The proportionate amount of the deductible attributed to Dragados' interests is $1,956.20, and the balance due Dragados as of December 26, 1973 was $298.043.80.

65. Bean is the successor-in-interest to B.R. Dredging Co.

66. Dragados made no claim upon defendants Cal-Surance Associates, Inc., Cal-Surance Overseas Agency, Inc. or Martin for payment of the insurance proceeds until September 24, 1976. Dragados' delay in pursuing its rights was deliberate and was motivated by its desire to avoid liability to the Mexican government for the costs of removing the Long from the Bay at Puerto Madero.

67. There is no credible evidence that Dragados' delay in initiating this action resulted in a loss of witnesses or evidence which would have supported defendants' position nor did the delay cause the defendants to change their position in a manner that would not have occurred but for such delay.

68. Cal-Surance Overseas Agencies, Inc., Cal-Surance Associates, Inc and Martin requested that Dragados forbear from filing an action against them (Exhibit 85) and Dragados did in fact forbear until October 31, 1977. Dragados' forbearance was reasonable under the circumstances.

69. To the extent that any of the foregoing Findings of Fact are found to be Conclusions of Law, they shall be deemed to be Conclusions of Law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction with respect to the main action pursuant to 28 U.S.C. §§ 1332, 1333. The Court has ancillary jurisdiction with respect to the third party claims and also jurisdiction pursuant to 28 U.S.C. § 1332.

2. Cal-Surance Overseas Agencies, Inc., Cal-Surance Associates, Inc., Donald Martin, B.R. Dredging, D.F. Bean Corporation and ANICO lack standing to litigate the question of whether Dragados has an insurable interest in the Long. Only the underwriters under Cover Note R.0153/3 have that right and they are not parties to the lawsuit.

3. Dragados had an insurable interest in the dredge, the Russell B. Long, at the time of the issuance of Cover Note R.0153/3 and on the date of loss, August 1, 1973.

4. Termination of the Contract of Sale after August 1, 1973, following the loss of the Long, did not affect the interest of Dragados in the insurance proceeds under Cover Note R.0153/3.

5. The intent of the parties under the contract of insurance, embodied in Cover Note R.0153/3, was that $1,200,000 of the insurance coverage was to cover the interests of B.R. Dredging and ANICO, with the remaining $300,000 covering the interests of Dragados.

6. Any defense which the underwriters had to payment under the Cover Note was waived when they made full payment thereunder. Following payment by the underwriters, Dragados was entitled to the payment of $298,043.80 which was its respective interest in the insurance proceeds.

7. Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin acted as agents for collection in collecting the proceeds payable under the Cover Note R.0153/3, pursuant to the written authorization given them by the insureds.

8. As agents and fiduciaries of the insureds under the policy, Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin had a duty to:

(a) Obey the instructions of their principles;

(b) Disburse the insurance proceeds only in accordance with the instructions of their principles;

(c) Disclose fully all matters material to the transaction to their principles;

(d) Account for the insurance proceeds;

(e) Act with loyalty to the interests of Dragados and not to take action prejudicial to Dragados' rights.

9. Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin breached their duty as agents and fiduciaries of Dragados in making payment of the insurance proceeds to B.R. Dredging without securing instructions from Dragados prior to disbursing the proceeds, in distributing the insurance proceeds on instructions from B.R. Dredging whose interests were adverse to Dragados, in failing to notify Dragados of the payment and in failing to account to Dragados for the proceeds.

10. Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin had a duty to Dragados pursuant to a written contract to distribute the insurance proceeds only in accordance with Dragados'

instructions, and to account fully for the proceeds. That duty was breached by defendants in making payment without any authorization from, or accounting to, Dragados.

11. Dragados had a right to prossession of the insurance proceeds and Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Donald Martin converted these proceeds by making payment to B.R. Dredging and ANICO without the permission, consent or authorization of Dragados.

12. Dragados is entitled to recover from Cal-Surance Associates, Inc., Cal-Surance Agencies, Inc. and Martin the sum of $300,000, less the proportionate amount of the deductible, for a total of $298,043.80, which was due December 26, 1973. Dragados is also entitled to its costs of suit.

13. It is well established in admiralty cases that compensatory damages normally include pre-judgment interest. *See Western Pacific Fisheries, Inc. v. SS President Grant*, 730 F.2d 1280, 1288 (9th Cir. 1984). Although the award of pre-judgment interest is within the discretion of the trial judge, this discretion "must be exercised with a view to the right to interest unless the circumstances are exceptional." *The President Madison*, 91 F.2d 835, 847 (9th Cir. 1937). The most common ground for denial of pre-judgment interest is unwarranted delay in commencing or prosecuting the action. *See Alkmeon Naviera, S.A. v. M/V Marina L*, 633 F.2d 789, 797 (9th Cir. 1980); *The President Madison*, 91 F.2d at 847. Such delay justifies the Court in exercising its discretion by "disallowing interest or allowing interest . . . for a less time than that for which it would normally be allowed." *The North America*, 24 F.2d 846, 848

(S.D.N.Y. 1928); *see also Pennsylvania R. Co. v. Downer Towing Corp.*, 11 F.2d 466, 468 (2d Cir. 1926) (because of plaintiff's "unnecessary delay" in prosecuting the action, award of pre-judgment interest was "for three years less time than that for which it would normally be allowed.")

As noted above, in order to promote its economic self-interest, Dragados deliberately delayed initiating this action. While such behavior may have been tactically wise, the Court believes that it constitutes a "peculiar circumstance", *M/V Marina L*, 633 F.2d at 798, which justifies the forfeiture of interest during the period of the intentional delay. However, the Court believes that such delay is excusable following November 18, 1976, the date on which Cal-Surance Associates, Inc. Cal-Surance Overseas Agencies, Inc. and Martin requested that Dragados forbear filing an action against these defendants. Consequently, the Court concludes that Dragados' entitlement to pre-judgment interest arose on November 18, 1976.

In setting the rate at which such interest should accrue, the Court is quided by the Ninth Circuit's recent decision in *Western Pacific Fisheries, Inc. v. SS President Grant*, 730 F.2d at 1289 (1984), in which the court stated that "the measure of interest rates prescribed for post-judgment interest in 28 U.S.C. § 1961(a) is also appropriate for fixing the rate for pre-judgment interest in cases such as this . . . , unless the trial judge finds, on substantial evidence, that the equities of the particular case require a different rate." Given the vast fluctuations in interest rates that have accurred since 1976 and the long period of time - almost eight years - that have elapsed between November 1976 and the date of judgment, however, the Court has concluded that it would be inequitable as well as

inconsistent with the policies underlying 28 U.S.C. § 1961(a)[1] to utilize the rate in existence as of November 18, 1976 as the sole basis for calculating the award of pre-judgment interest in this action.

The Court believes that the following approach more accurately estimates the true cost of money during the past eight years. The interest rate specified in 28 U.S.C. § 1961(a) shall be taken for the last auction of fifty-two week United States Treasury Bills settled immediately prior to November 18, 1976. Interest on the pre-interest award of $298,143.80 will accrue at this average rate for the period running from November 18, 1976 through November 17, 1977. Interest on the pre-interest award plus the first year's accrued interest will then accrue from November 18, 1977 through November 17, 1978 at the rate derived under § 1961(a) for the last auction of fifty-two Treasury Bills settled immediately prior to November 18, 1977. This process will be repeated, compounding interest annually, through the date of judgment. The calculation of the interest award shall be attached to the judgment as Exhibit A.

14. Although the Court finds that there were elements of impropriety in connection with the payment of proceeds by Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin, the Court does not find that

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[1] If the interest rate in effect on November 18, 1976 exceeded the rate thereafter, a fixed rate pegged to the November 18, 1976 rate would provide plaintiff with an economic incentive to delay the action. If, on the other hand, the rate in effect on November 18, 1976 was less than the rate thereafter, a fixed rate would provide defendants withh an economic incentive to delay. Only a variable rate will remove this perverse incentive.

plaintiff is entitled to attroney's fees from these defendnats.

15. Between two and three years elapsed from the time defendants made their final payment of the proceeds under Cover Note R.0153/3 to B.R. Dredging and ANICO until defendants requested that Dragados forbear from filing suit. During this period of time, which the Court considers the relevant one for purposes of applying the doctrine of laches, the state statute of limitations had expired for Dragados' claims for breach of the duty of good faith and fair dealing and for money had and received. The state statute of limitations had not expired for Dragados' claims for breach of contract, breach of fiduciary duty, breach of the duties of agency and conversion.

While the comparable state statute of limitations is a quideline, in applying the doctrine of laches, this Court must also consider the prejudice to the defendnats and the reasons for the delay. *See, e.g., Sandvik v. Alaska Packers Association*, 609 F.2d 969, 971 (9th Cir. 1979). Given Finding of Fact No. 67, *supra*, the Court concludes that Dragados' delay did not prejudice the defendants. *See Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 844 (D.C. Cir. 1982). The Court further concludes that Dragados has not proferred a "legitima[te] . . . excuse", *Larios v. Victory Carriers, Inc.*, 316 F.2d 63, 66 (2nd Cir. 1963), for its delay in initiating this action. While delay for the purposes of avoiding liability to the Mexican government may be understandable, the Court does not believe that it constitutes a legally satisfactory excuse for the delay. Since Dragados' delay is not excusable and since this delay did not prejudice Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin, the Court

concludes that the comparable state statutes of limitations are dispositive in this action. Therefore, the actions for breach of the implied covenant of good faith and fair dealing and money had and received are barred by laches. The remaining causes of action for breach of contract, breach of fiduciary duty, breach of the duties of agency and conversion are not barred.

16. The rights of the parties under Cover Note R.0153/3 are determined by their intent under the insurance contract. Dragados as a named insured, and based upon the clear intent of the parties, was entitled to receive $300,000 from the $1,500,000 payable pursuant to the Cover Note.

17. The rights and interests of the parties herein under the Cover Note were not required to be, nor were they, coextensive with their interests in the vessel, the Russell B. Long. The maritime mortgage held by ANICO did not, in and of itself, establish an interest in the proceeds payable under the Cover Note, nor did it give ANICO priority over Dragados.

18. Pursuant to the parties' stipulation and the record before the Court, Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc., and Martin requested on November 18, 1976, that Dragados forbear from filing an action against these defendants (Exhibit 85) and Dragados did in fact forbear until October 31, 1977, which action was reasonable and defendants are stopped from claiming laches or the bar of any statute of limitations for the delay between November 18, 1976 and October 31, 1977. *See Desilvio v. Prudential Lines.*, 701 F.2d 13, 16-17 (2d Cir. 1983).

19. J. Manson Murray negligently misrepresented facts to Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin in his letter of November 12, 1973, and was negligent in expressing his opinion that it was right and proper for Cal-Surance to pay the insurance proceeds to B.R. Dredging and ANICO. *See Lipscomb v. Krause*, 87 Cal. App. 3d 970, 151 Cal. Rptr. 465 (1978). The liability of J. Manson Murray and Vickers, Riis, Murray and Curran to Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin existed irrespective of any lack of privity of contract between them. *See Roberts v. Bell, Hunt, Hart, Brown and Baerwitz*, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976).

20. J. Manson Murray & Curran in rendering his opinion.

21. J. Manson Murray was acting in his capacity as general counsel for B.R. Dredging and as an agent of B.R. Dredging in rendering his opinion.

22. J. Manson Murray and Vickers, Riis, Murray & Curran are obligated to indemnify Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin for the judgment rendered against them in favor of Dragados.

23. C.F. Bean, B.R. Dredging's successor-in-interest, is obligated to indemnify Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin for the judgment rendered against them in favor of Dragados.

24. B.R. Dredging obtained the insurance proceeds from Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin as a proximate result, in part, of the negligent acts of Murray, acting as agent for B.R. Dredging. Consequently, Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin are entitled to a constructive trust in the amount of $298,043.80 as against C.F. Bean. *See Martin v. Kehl*, 145 Cal. App. 3d

228, 236-238, 193 Cal. Rptr. 312 (1983); Calif. Civil Code §§ 2223, 2224.

25. C.F. Bean is obligated to indemnity J. Manson Murray and Vickers, Riis, Murray and Curran for the judgment rendered against Murray and the Vickers firm in favor of Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin. J. Manson Murray and Vickers, Riis, Murray & Curran are entitled to their costs of suit.

26. American National Insurance Company recieved its proper share of the insurance proceeds and has no duty to indemnity Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc., Martin, J. Manson Murray or Vickers, Riis, Murray & Curram. ANICO is entitled to judgment on the third party complaint filed by Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin together with its costs of suit.

27. Robert N. Antenucci, Donald H. Mehling and William C. Peters are not liable for the acts of Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin and shall have judgment against Dragados together with their costs of suit.

28. In their third party complaint, Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin seek an award of attorney fees, not *qua* attorney fees, but rather as an item of damages, The question of whether they are entitled to such fees will be governed by state law "only in the absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice." *Bohemia, Inc. v. Home Insurance Co.*, 725 F.2d 506, 510 (9th Cir. 1984). As is often the case in this troublesome area, the parties disagree as to whether local law or admiralty law is controlling. However, it is

unnecessary for the Court to determine which body of law to apply because, on reconsideration, under either maritime law or California law, the Court is now persuaded that Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin are entitled to their attorney fees.

Under California law, a person who, through the tort of another, has been required to act in protection of his interests by bringing or definding an action against a third person is entitled to recover compensation for reasonably necessary attorney fees and other expenditures incurred. *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz,* 57 Cal. App. 3d 107, 128 Cal. Rptr. 901 (1976). Therefore, Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin are entitled to an award of attorney fees under California law.

The prevailing party in an admiralty case is generally not entitled to an award of attorney fees. *See, e.g., Noritake Co. Inc. v. M/V Hellenic Champion,* 627 F.2d 724, 730 (5th Cir. 1980). However, an exception to this general rule permits a court, in its discretion, to award attorney fees to an indemnitee against his indemnitor as an element of his damages. *See E.I. DuPont de Nemours & Co. v. Riverway,* 639 F.2d 404, 407-09 (5th Cir. 1981). Because the Court is convinced that the culpability of the third party plaintiffs, and that Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin were each justified in relying on the statements made to them by Murray and on his opinion, the Court has concluded that an award of attorney fees to Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin is warrented as against Murray and Vickers. Upon submission of a properly supported application to the Court within ten (10) days of the date of these Findings and Conclusions, an award of

fees will be made to these parties.

29. Cal-Surance Associates, Inc., Cal-Surance Overseas Agencies, Inc. and Martin are entitled to their costs of suit against Murray, Vickers and C.F. Bean.

30. To the extent that any of the foregoing Conclusions of Law are found to be Findings of Fact, they shall be deemed to be Findings of Fact.

DATED: /s/ March 29, 1985

/s/ Mariana R. Pfaelzer

Mariana R. Pfaelzer
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DRAGADOS, S. A., Plaintiff, vs. CAL-SURANCE ASSOCIATION, INC, a corporation; CAL-SURANCE OVERSEAS AGENCY, INC., a corporation, DONALD A. MARTIN; ROBERT N. ANTENUCCI; DONALD H. MEHLIG; WILLAIM C. PETERS and PETER WACOGNE, Defendants.	)	CASE NO. CV 77-4081 MRP FINDINGS OF FACT AND CONCLUSIONS OF LAW RE MOTION FOR SUMMARY JUDGMENT ON C. F. BEAN CORPORATION'S SECOND AMENDED COUNTERCLAIM
AND RELATED CROSS-ACTIONS.	)	

Dragados' Motion for Summary Judgment on C. F. Bean Corporation's Second Amended Counterclaim having come for hearing before the Court on May 6, 1985, at 10:00 a.m., the Honorable Mariana R. Pfaelzer, Judge Presiding, with Fletcher W. Paddison, Esq., of Miller, Boyko and Bell appearing on behalf of plaintiff and counter-defendant Dragados, S.A., and Jon Cederberg of Musick, Peeler & Garrett, appearing on behalf of third party defendant and counter-plaintiff C.F. Bean Corporation, and the Court having considered the pleadings, papers and affidavits on file herein and the oral argument of counsel, and good appearing therefor, the Court hereby enters the following rulings.

FINDINGS OF FACT

The Court hereby finds that the following issues of fact are either undisputed or have established by the affidavits and pleadings on file herein such that there is no material issue as to the existence of such fact.

1. Prior to August 1, 1973, B.R. Dredging Company as the owner of a dredge, the Russell B. Long, entered into a Contract of Sale with Dragados, S. A.

2. Pursuant to the Contract of Sale, title to the Long owner of a dredge past the shoreline at Puerta Madera, Mexico.

3. On August 1, 1973, the Long sank at Puerta Madera.

4. At the time of the sinking, the Long had not dredged past the shoreline at Puerta Madera, Mexico, and title had not passed to Dragados.

5. Following the sinking of the Long, the Mexican Navy removed the vessel and instituted separate proceedings against B.R. Dredging Company and Dragados for the removal costs.

6. Pursuant to administrative proceedings before the Mexican courts, and specifically the First Collegiate Court of Administrative Cases, the Mexican courts have held that Dragados was not liable for the wreck removal costs pursuant to the Mexican Law of Navigation and Maritime Commerce; that the Law of Navigation and maritime Commerce exclusively governed the imposition of wreck removal costs by the Mexican government; that the owner of the vessel is solely liable for the removal costs; and that Dragados was not the owner of the vessel and was not liable for these costs.

7. Under Mexican law, the Law of Navigation and Maritime Commerce governs the imposition of wreck removal costs, and all other laws are supplemental.

8. Under Mexican law, liability for wreck costs is imposed only upon the shipowner.

9. In proceedings before the United States District Court, and subsequently proceedings before the United States Fifth Circuit Court of Appeals, in the action entitled *"Thornton v. Bean Contracting Company,"* C.F. Bean Corporation alleged, and the Fifth Circuit Court of Appeals so held, that title to the dredge, the Russell B. Long, did not pass to Dragados and that on August 1, 1973, B. R. Dredging Company was the owner of the vessel.

10. C. F. Bean Corporation is the successor-in-interest to B. R. Dredging Company.

11. Dragados was not the owner of the vessel, the Russell B. Long, as of August 1, 1973.

CONCLUSIONS OF LAW

Based upon the finding that the foregoing facts are undisputed or that there is no material issue with respect to the existence of such facts, the Court hereby enters the following Conclusions of Law.

1. Pursuant to Federal Rules of Civil Procedure, Rule 44.1, the Court hereby finds that the Mexican Law of Navigation and Maritime Commerce governs the imposition of wreck removal costs and imposes liability upon the shipowner of the vessel.

2. The Court further makes the determination under Rule 44.1 that under Mexican law Dragados is not liable for the removal costs imposed by the Mexican government.

3. As an additional alternative Conclusions of Law, the Court holds that based upon the proceedings in Mexico, and in the United States, as well as the matters before this Court, Dragados was not the owner of the Russell B. Long as of August 1, 1973, and was not liable for the removal costs under Mexican law.

4. B. R. Dredging Company, the predecessor-in-interest of C. F. Bean Corporation, was the owner of the Long on August 1, 1973, and was solely liable for the removal costs.

5. Dragsdos has not alleged, nor has this Court found, in the proceedings upon Dragados' Complaint, that Dragados held an interest in the Long as an owner, joint venturer, or partner.

6. Dragados was not jointly liable for the removal costs of the Long with B. R. Dredging Company.

7. Inasmuch as Dragados is not liable for the removal costs, C. F. Bean Corporation, as the successor-in-interest to B. R. Dredging Company, is not entitled to seek equitable indemnity or contribution against Dragados for the removal costs.

8. Summary judgment should issue in favor of Dragados and against C. F. Bean Corporation on C. F. Bean Corporation's Second Amended Counterclaim.

DATED: _____

_____

MARIANA R. PFAELZER, JUDGE
UNITED STATES DISTRICT
COURT

3DP

Supreme Court, U.S.
FILED
DEC 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-917

In The
Supreme Court of the United States
October Term, 1986

C. F. BEAN CORPORATION,

Petitioner,

versus

DRAGADOS, et al.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTION PRESENTED

Do the "special and important reasons" required for the granting of review on writ of certiorari (Rule 17.1) exist where (a) petitioner has not shown any conflict between this decision and the decisions of other courts of appeal or this Court; (b) the collateral estoppel issue raised by petitioner was not raised on the appeal to the Court of Appeals and was merely an alternative ground for the District Court's judgment; (c) petitioner in its brief before the Court of Appeals failed to include any citations to the record and the Court of Appeals found that the appeal was frivolous pursuant to Federal Rules of Appellate Procedure, Rule 38; and (d) there is substantial evidence in support of the District Court's findings and petitioner has failed to demonstrate how the findings were clearly erroneous.

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NO. 86-917

In The
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C. F. BEAN CORPORATION,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

C. F. Bean's Petition states that: "This case presents the question of whether the District Court improperly applied the principle of collateral estoppel to the final decision of a tribunal of the Department of Admiralty of the Government of Mexico." This is the primary issue presented by C. F. Bean Corporation ["Bean"]. How-

ever, this issue was neither *raised nor briefed* before the Court of Appeals.[1] It is raised for the first time in the Petition for Writ of Certiorari. It is so obviously without merit that Bean's former counsel (who was trial counsel) did not see fit to raise the issue on appeal.

Bean is a third party defendant in this action and the only party to dispute the underlying judgment. Bean's petition attempts to raise three issues: (1) the collateral estoppel issue which is raised for the first time; (2) the sanctions imposed for a frivolous appeal; and (3) Bean's attack upon the District Court's findings. The petition is frivolous and should be denied.

Bean's new counsel has presented a distorted statement of the case in support of its petition; purportedly based upon various undisputed findings by the District Court. As in the appeal to the Ninth Circuit Court of Appeals, Bean has failed to present an accurate statement of the facts and the proceedings before the District Court.

A. Statement of Facts.

The complaint in this action was based upon a policy of hull insurance issued by Lloyds of London covering the dredge, the *Russel B. Long*. Bean's predecessor in interest, B. R. Dredging Company, had agreed to sell the *Long* to Dragados for a purchase price of $1.2 million. [Findings Nos. 2 & 3.][2] The dredge was to be towed

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1 Bean's brief to the Court of Appeals is appended hereto.

2 The findings of the District Court are appended to Bean's petition at Appendix C.

to Puerta Madera, Mexico, where the sale, and the transfer of title, to Dragados would be completed.

The District Court found that the value of the *Long* at the time of the purchase contract in April, 1972, was $1.2 million [Findings Nos. 9 & 10], which was the amount of the insurance coverage at the time. [Finding No. 8]. Thereafter, and prior to the tow of the *Long*, Dragados performed various extensive repairs upon the vessel, increasing its value to $1.5 million. Dragados had substantial out-of-pocket expenditures in connection with these repairs. [Findings Nos. 4, 11, 12 & 26.] As a result of the repairs by Dragados, the insured value of the *Long* was increased from $1.2 million to $1.5 million. [Findings Nos. 22 & 23.] B. R. Dredging did not make any expenditures upon the *Long*.

B. R. Dredging's existing policy of fleet insurance did not insure the tow to Puerta Madera, Mexico. [Finding No. 13.] B. R. Dredging and Dragados agreed to jointly obtain insurance to cover their respective interests, increasing the insured value to $1.5 million. B. R. Dredging suggested, and Dragados agreed, that Cal-Surance (the insurance brokers for B. R. Dredging) would obtain a policy on the *Long* increasing the insured value to $1.5 million, extending the policy's navigational limits to Puerta Madera, Mexico, and naming B. R. Dredging, Dragados and ANICO as insureds. [Findings Nos. 17-19.] Pursuant to these discussions, Cal-Surance procured a cover note from Lloyds of London insuring the *Long* for $1.5 million and naming as insureds: "B. R. Dredging, Inc./Dragados, S.A. and American National Ins. Co., as mortgagees." [Findings Nos. 20 & 22.] Dragados paid for this insurance.

At the trial, numerous witnesses testified that the increase in insurance coverage was based upon discussions between B. R. Dredging and Dragados whereupon it was agreed that the insurance coverage would be increased, with the additional $300,000.00 in insurance to cover Dragados's interest. [Findings Nos. 19, 23 & 24.]

During the tow, and prior to the time that title to the dredge passed to Dragados, the dredge sank and was declared a constructive total loss. [Finding No. 27.] Following the loss, Cal-Surance procured *joint* written authorizations from Dragados, B. R. Dredging and ANICO, authorizing Cal-Surance to collect the proceeds from Lloyds for the insureds' account. [Finding No. 31.] Lloyds paid the entire insured value of the *Long* to Cal-Surance. [Findings Nos. 36-38.] Cal-Surance, acting as the agent of the insureds, Dragados, B. R. and ANICO, thereafter disbursed the proceeds *without Dragados's authorization* and without any notice to Dragados. [Findings Nos. 59 & 61-63.]

Unbeknownst to Dragados, B. R. Dredging had demanded that the entire insurance proceeds be made payable to B. R. Dredging and ANICO. Cal-Surance requested, and obtained, an opinion of B. R. Dredging's counsel that it was "right and proper" to make payment solely to B. R. and ANICO, and to the exclusion of Dragados. [Findings Nos. 43-49.] Cal-Surance knew of Dragados's interest, yet did not seek Dragados's authorization or notify Dragados of the disbursement of the funds. [Findings Nos. 42, 61-63.][3]

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[3] The record before the District Court showed that ANICO, following the loss, never claimed or asserted any interest in the

(Continued on following page)

B. Statement of Proceedings on Dragados's Complaint.

In October, 1977, Dragados filed this action against Cal-Surance Overseas Agency, Inc., Cal-Surance Associates, Inc., and Donald A. Martin, alleging breach of agency, breach of fiduciary duty, conversion and negligence. Cal-Surance filed a third party complaint against B. R. Dredging and ANICO as well as against J. Manson Murray, Esq. At the trial of the matter, Bean (B. R. Dredging's successor) and ANICO were *both* represented by the *same* counsel.

A bench trial was conducted before The Honorable Mariana R. Pfaelzer commencing March 2, 1982, and ending on March 17, 1982, with 12 witnesses, several depositions, and more than 600 exhibits being introduced at trial. On November 1, 1982, the District Court rendered its decision holding that Cal-Surance was liable to Dragados for damages in the amount of $298,043.80, plus interest. The District Court also held in favor of Cal-Surance on the third party complaint against Bean and Murray. After further briefing on several subsidiary issues (issues primarily between the defendants and third party defendants), the District Court entered the Judgment and its Finding of Fact and Conclusions of Law in March, 1985. Bean appealed.[4]

(Continued from previous page)

increased amount of insurance coverage. Upon payment of the insurance proceeds, ANICO received $750,000.00. The remaining amounts were retained by B. R. Dredging.

[4] The sole ground asserted upon appeal was that the court's findings concerning the intent of the parties was not supported

(Continued on following page)

The United States Court of Appeals for the Ninth Circuit affirmed the judgment.

C. Statement of Proceedings on Bean's Counterclaim.

Bean filed a counterclaim against Dragados, which was severed for separate trial pursuant to Federal Rules of Civil Procedure, Rule 42(b). The primary issue raised by the petition for certiorari is based upon the counterclaim.

Bean, following the loss of the *Long*, was held responsible for the wreck removal costs imposed by the State of Mexico. In its counterclaim, Bean argued that Dragados's assertion of an insurable interest in the vessel made it liable for a portion of the removal costs under the theory of equitable indemnity. In order to prevail upon its counterclaim Bean had to prove that Dragados was jointly liable for the removal costs.

The District Court ruled that under Mexican law liability for removal costs was imposed solely upon the owner of the vessel. The court, pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, made its own independent determination of the provisions of Mexican law. Thus, the court found that: "Under Mexican law, liability for wreck costs is imposed only upon the shipowner." [Bean's Petition A-39, Finding No. 8, Conclusion No. 2.] As an *alternative* ground, the court found that Bean was collaterally estopped from attacking the proceedings before the First

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(Continued from previous page)

by the record. [See Appendix B.] The Ninth Circuit held that there was substantial evidence supporting the district court's findings and held that Bean's appeal was frivolous.

Collegiate Court of Administrative Cases [Conclusion No. 3].[5]

Thus, the court held that under Mexican law only the shipowner was liable for removal costs; and that Dragados was not the owner and had no liability for such removal costs. This was an entirely separate issue from Dragados's insurable interest in the vessel, and the assertion of an insurable interest (which is separate and apart from ownership) did not subject Dragados to any liability for the removal costs. Accordingly, the court found that there was no joint liability which would call for the application of the principles of equitable indemnity. The court entered summary judgment for Dragados upon Bean's counterclaim.

Bean appealed from this separate judgment in Appeal No. 85-6086. This appeal was consolidated with the appeal on the primary action. On appeal, Bean failed to raise any issues on the order of summary judgment. As noted by the Court of Appeals: "Bean raises no issues on its appeal in No. 85-6086." [Appendix A-3.] None of the District Court proceedings were placed before the Court of Appeals. Bean, in its record, failed to include the judgment, the order of summary judgment, its notice of appeal in Appeal No. 85-6086, the court's Findings of Fact and Conclusions of Law, or any of the briefs or other materials presented to the District Court in support of, or in opposition to, the motion for summary judgment.

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[5] In other proceedings before the United States Fifth Circuit Court of Appeals, Bean had affirmatively alleged (and proven) that B. R. Dredging [Bean] was the owner of the *Long* at the time of the loss. [Bean's Petition A-39, Finding No. 9.] The court held that Bean's assertion of this fact in other litigation was binding upon Bean.

REASONS FOR DENYING THE WRIT

A review on the writ of certiorari "is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." Supreme Court Rule 17.1. Petitioner, C .F. Bean Corporation, has failed to set forth any grounds for a review of this matter on writ of certiorari.

The judgment of the District Court was based upon a breach of fiduciary duty by defendant Cal-Surance, whereby various monies which were owed to Dragados were paid to Bean who was required to disgorge this windfall through the judgment of the District Court. The Findings of Fact and Conclusions of Law by the court were extremely thoughtful and well prepared. The Ninth Circuit Court of Appeals concurred, not only affirming the judgment, but finding Bean's appeal to be frivolous.

Bean's petition for certiorari fails to show any "special and important reasons" as stated in Rule 17 of the Rules of the Supreme Court of the United States. Indeed, the primary issue which is now urged by Bean was not even raised before the Court of Appeals.

The judgment of the Court of Appeals is not in conflict with the decision of another Court of Appeals on the same matter. Rule 17.1(a). Nowhere does the petition demonstrate that any legal standard, or analysis, employed by the decision conflicts with the standards employed by other circuit courts or this Court. Indeed, the primary issue raised by the petition, *i.e.*, the issue of "collateral estoppel," was not the primary basis but was the alternative basis for the District Court's ruling. Neither basis was raised before the Court of Appeals on appeal.

Nor does petitioner demonstrate how the decision departs from the accepted and usual course of judicial proceedings so as to call for an exercise of the Supreme Court's power of supervision. The District Court judgment was based on a careful review of the evidence and is supported by a comprehensive series of findings and conclusions. The Court of Appeals ruled that substantial evidence supported the rulings.

Finally, petitioner does not identify any important question of federal law which has not been, but should be, settled by the Court. The petition does not identify how the opinion below will affect federal jurisprudence in any respect at all. Rule 17.1(c). Indeed, the decision revolves upon the general principles of jurisprudence and the interpretation of contracts. The central issue presented by the underlying District Court judgment was the responsibility of Cal-Surance to follow the instructions of its principal and to account for monies collected on behalf of its principal. These rulings call for the application of well established rules of jurisprudence, which are largely based upon state—not federal—law.

Based upon the foregoing, it is evident that the Petition for Writ of Certiorari should be denied. No special or important reasons for granting certiorari have been demonstrated by Bean.

ARGUMENT

I. PETITIONER FAILED TO ASSERT THE ISSUE OF COLLATERAL ESTOPPEL BEFORE THE NINTH CIRCUIT COURT OF APPEALS

The first question presented by petitioner for review is whether the District Court improperly applied the principle of collateral estoppel against C. F. Bean.[6]

This issue was not raised before the Court of Appeals. The judgment on Bean's counterclaim was raised in Appeal No. 85-6086. As the Court of Appeals noted in its Memorandum, "Bean raises no issues on its appeal in No. 85-6086." [Appendix A-3.] No issues concerning the summary judgment were raised in any of the proceedings before the Court of Appeals. Accordingly, the issue of collateral estoppel is now asserted *for the first time* in this petition for writ of certiorari. Obviously, Bean abandoned this appeal and has *waived* this issue.

This Court has frequently held that issues not raised before the Court of Appeals will not be addressed by the Supreme Court absent extraordinary circumstances. Thus, in *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. —, 106 S.Ct. 1678, 1681, 90 L.Ed.2d 19, 24 (1986), the Court refused to consider issues which had not been raised before the Court of Appeals:

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[6] In fact, petitioner misstates the District Court's ruling. The District Court made a determination of Mexican law pursuant to Federal Rules of Civil Procedure, Rule 44.1. Alternatively, it applied the rule of collateral estoppel as a basis for holding that Dragados was not liable for the removal costs incurred by the State of Mexico.

> Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals. [Citations omitted.]

See also, G. D. Searle & Co. v. Cohn, 455 U.S. 404, 412 n. 7, 102 S.Ct. 1137, 1143, 71 L.Ed.2d 250, 258 (1982); *Rogers v. Lodge,* 458 U.S. 613, 628 n. 10, 102 S.Ct. 3272, 3281, 73 L.Ed.2d 1012, 1025 (1982) ["This contention was not properly raised in the Court of Appeals and was not addressed by that court. We therefore do not address it."]; *Delta Airlines, Inc. v. August,* 450 U.S. 346, 362, 101 S.Ct. 1146, 1155, 67 L.Ed.2d 287, 298 (1981) ["Although defendant's petition for certiorari presented the question of the district judge's abuse of discretion . . . that question was not raised in the Court of Appeal and is not properly before us."].

The first time this issue has been raised is in the petition for writ of certiorari. Even there, Bean has failed to include any record of the proceedings before the District Court on the granting of the order and the Court should properly refuse to consider the issue.

II. THE COURT CORRECTLY RULED ON THE COUNTERCLAIM

In Dragados's complaint against Cal-Surance, the issue was whether Cal-Surance, as the agent for Dragados, breached its duties in distributing insurance proceeds without the authorization of Dragados. The court found that Cal-Surance did breach its duties. The court then went on to find that Dragados performed extensive repairs to the *Long* which increased its value to $1.5 million, and that B. R. Dredging and Dragados had agreed that the insurance

coverage on the *Long* would be increased in order to protect the interests of Dragados.

Bean makes the entirely specious argument that any entity which had an insurable interest in the vessel would be liable for the removal costs of the vessel. This is a misstatement of the record before the court and a complete misstatement of the law.

The Supreme Court long ago decided that an interest in insurance proceeds is separate and apart from an interest in the property itself. *Place v. Norwich & New York Transportation Co.*, 118 U.S. 468, 6 S.Ct. 1150 (1886). An insurable interest in a vessel has *nothing* to do with the liability for the removal costs. Under Mexican law, liability for removal costs is imposed *solely* upon the shipowner.[7]

Liability for wreck removal costs is not imposed under Mexican law upon an individual merely because they have an insurable interest in the vessel. Thus, by way of example, ANICO had no liability for wreck removal costs, although it had a clear insurable interest in the *Long*.

Dragados had an insurable interest in the *Long*. Its interest was based upon the repairs to be conducted by Dragados, Dragados's expectation of profit from the dredging operations to be conducted with the dredge pursuant to a contract with the State of Mexico, and Dragados's interest as the purchaser under the Contract of Sale. [Findings Nos. 4, 6, 11 & 12.] Each of these is a well recognized basis for an insurable interest.

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[7] Insurance coverage for this type of liability is customarily carried by the owner under a Protection and Indemnity Policy.

The District Court made its determination of Mexican law under Federal Rules of Civil Procedure, Rule 44.1.[8] This was also the holding of the Mexican courts and, *alternatively,* the District Court held that Bean [B. R.] was collaterally estopped from contesting this issue.

Bean's counterclaim was completely without merit. Bean alleged that Dragados (because it held an insurable interest) was jointly liable for the wreck removal costs under Mexican law and Bean was entitled to equitable indemnity for these costs. The court ruled that under Mexican law Dragados was not liable for the wreck removal costs; liability was imposed only upon the shipowner—B. R. Dredging. Dragados's insurable interest did not make it liable for these costs. Inasmuch as there was no joint liability, there was no basis for the application of the principles of equitable indemnity. Accordingly, the court entered summary judgment in favor of Dragados and against Bean.

Petitioner has failed to show how this issue merits consideration. Petitioner has failed to demonstrate how the decision conflicts with any decision of another court of appeals or this Court. This issue does not present an issue under federal law which requires resolution by the Supreme Court. Bean's position lacked any merit before the District Court, was not even raised before the Court of Appeals, and does not merit review by the Supreme Court.

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[8] Significantly, Bean presented no contrary evidence to the District Court on the provisions of Mexican law although Bean had more than three years to prepare its opposition to the motion for summary judgment.

III. SANCTIONS IMPOSED BY THE COURT OF APPEALS FOR A FRIVOLOUS APPEAL WERE NECESSARY AND PROPER

The Court of Appeals properly imposed sanctions upon C. F. Bean for the filing of a frivolous appeal. Bean, having delayed these proceedings for several years, now complains that it should not be held liable for its tactics.

Bean's appeal attacked one of the District Court's findings. The brief did not raise any issue, or include any record of the proceedings before the District Court, on the order of summary judgment. Obviously, the appeal filed from that judgment was frivolous.

Secondly, on the issues that were raised by Bean in its appeal, Bean *made no attempt* to review any of the records or proceedings before the District Court. Extensive findings were entered, based upon a voluminous record incorporating more than 600 exhibits. Although Bean attempted to attack the court's findings, no citations to the record or to the testimony or exhibits were stated in Bean's appeal. Dragados, because of Bean's failure to cite the record, was required to review and research the record before the District Court.

Based upon this record, the Court of Appeals held that: "Substantial evidence existed to support the District Court's findings." [Memorandum Opinion, A-2.] The Court of Appeals then noted that: "Bean makes no serious attempt to point to evidence in the record, or lack thereof, that would undermine the District Court's findings." [Memorandum Opinion, A-3.] Bean's appeal was frivolous. The Ninth Circuit properly imposed sanctions upon Bean pursuant to Federal Rules of Appellate Pro-

cedure, Rule 38, which provides that: "If a Court of Appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Petitioner fails to show how this conflicts with the decisions of other courts of appeal or with this Court. Indeed, Rule 49.2 of the Rules of the Supreme Court of the United States provides that: "When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages." Petitioner fails to show any special reasons meriting review of this issue.

IV. BEAN HAS FAILED TO SHOW THAT THE DISTRICT COURT'S FINDINGS WERE CLEARLY ERRONEOUS

Bean's final basis for its petition for writ of certiorari argues that the Court of Appeals "misunderstood the lack of record citations in the original appeal" and did not comprehend the nature of Bean's appeal. The Ninth Circuit Court of Appeals fully comprehended Bean's appeal, and the issues presented in the appeal, and found them to be frivolous.

The issue in the primary action dealt with the payment of insurance proceeds on the Lloyds policy which had been distributed to Cal-Surance. The proceeds payable upon the loss of the *Long* were in the amount of $1.5 million. It was understood, in connection with the issuance of the policy, that $300,000 of the insurance coverage was issued to protect the interests of Dragados. The court held that it was the clear intent of the parties to the contract of insurance to have $1.2 million of the insurance coverage protect the interests of B. R. [Bean] and ANICO, with the remaining coverage to protect Dragados's interest. An

extensive record existed to support these findings and this record was presented *in detail* to the Court of Appeals. Based upon this record, the appellate court found that: "Substantial evidence existed to support the District Court's findings."

Bean was required to show how these findings are clearly erroneous. (Federal Rule of Civil Procedure, Rule 52.) Bean, in attempting to attack these findings, makes no use of the record and incorporates no citations. Instead, Bean attempts to rely upon the specious argument that ANICO never participated in the issuance of the Cover Note and its intent was not established. Through such sophistry, Bean sidesteps the issues before the District Court while it presents a distorted argument to this Court. As the Court of Appeals noted:

> ANICO's intent is irrelevant. ANICO did not participate or otherwise involve itself in the purchase of the tow insurance policy. Under the mortgage contract, B. R. Dredging was obligated to purchase and maintain fleet insurance and list ANICO as a named insured. As long as ANICO's interest in the collateral was protected, which it was throughout this transaction, ANICO would not be concerned with an increased liability coverage designed to protect the interest of a third party. [Memorandum Opinion, A-2.]

This is an issue of contract interpretation. The District Court made detailed and well supported findings. Petitioner has failed to show how these are clearly erroneous. Both Bean and ANICO were represented by the same counsel in these proceedings; ANICO was fully paid all of the money in which it claimed an interest; *and ANICO failed to appeal from this judgment.* Bean has no standing to raise an issue which, at best, deals with a disinterested third party.

Most significantly, petitioner fails to show how the decision raises a significant issue of federal law or conflicts with other decisions. It is evident this is not a proper case for review by this Court and the petition should be summarily denied.

V. SANCTIONS SHOULD BE IMPOSED FOR THE FILING OF A FRIVOLOUS WRIT OF CERTIORARI

As noted, Rule 49.2 of the Rules of the Supreme Court of the United States provides for the imposition of sanctions for the filing of a frivolous petition for writ of certiorari. Sanctions are appropriate and necessary in order to regulate the proceedings before this Court. It is clear that this Petition is frivolous and was imposed solely for purposes of delay.

For these reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

MILLER, BOYKO AND BELL
FLETCHER W. PADDISON

— and —

JOSEPH V. FERGUSON, II

Counsel for Respondent
Dragados, S.A.

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAGADOS, S. A.,	)	Filed Aug 19 1986
Plaintiff-Appellee,	)	NOS. 85-5840 85-5860 85-5890
vs.	)	85-6086
CAL-SURANCE ASSOCIATION, INC., et al.,	)	DC# CV 77-4081-MRP
Defendants/Third-Party Plaintiff/Appellees,	)	MEMORANDUM*
vs.	)	
C. F. BEAN CORPORATION,	)	
Third-Party Defendant/ Appellant.	)	

Appeal from the United States District Court
for the Central District of California

Honorable Mariana R. Pfaelzer, District Judge, Presiding
Argued and Submitted June 5, 1986

Before: GOODWIN, TANK and FLETCHER, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Third-Party Defendant, C. F. Bean Corp. (Bean) appeals the judgment of the district court holding that Dragados is entitled to a portion of the insurance proceeds which Cal-Surance improperly paid to B. R. Dredging[1] and American National Insurance Company (ANICO). We affirm.

Substantial evidence existed to support the district court's findings. Dragados had agreed to purchase the dredge "Russell E. Long" (Long) from B. R. Dredging. The parties purchased an insurance policy to cover the Long's journey from seller to buyer. Dragados, B. R. Dredging and ANICO (B. R. Dredging's mortgagee) were named as the insureds in the contract.

In the absence of a showing of a party's intent regarding the distribution of proceeds to the named payees, "the loss-payable clause of the policy may be construed as requiring a division in proportion to the respective insurable interest . . . . " *Walsh v. Tadlock,* 104 F.2d 131, 132 (9th Cir.), *cert. denied,* 308 U.S. 584 (1939). The district court's finding that Dragados and B. R. Dredging agreed to obtain tow insurance and further agreed that the $1.5 million coverage, a $300,000 increase over existing coverage, would protect Dragados' repair work investment in the Long is not clearly erroneous.

ANICO's intent is irrelevant. ANICO did not participate or otherwise involve itself in the purchase of the tow insurance policy. Under the mortgage contract, B. R. Dredging was obligated to purchase and maintain fleet in-

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[1] Appellant C. F. Bean Corp. is a successor-in-interest to B. R. Dredging.

surance and list ANICO as a named insured. As long as ANICO's interest in the collateral was protected, which it was throughout this transaction, ANICO would not be concerned with an increased liability coverage designed to protect interest of a third party.

We find this appeal frivolous. Bean makes no serious attempt to point to evidence in the record, or lack thereof, that would undermine the district court's findings. *See DeWitt v. Western Pacific Railroad Co.*, 719 F.2d 1448, 1451 (9th Cir. 1983). Further, Bean raises no issues on its appeal in No. 85-6086. We therefore award single costs and fees to all parties whose presence was necessitated by this appeal.

AFFIRMED.

APPENDIX B

No. 85-5840

(Consolidated with Nos. 85-5860, 85-5890, and 85-6086)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAGADOS, S.A.,

Plaintiff/Appellee,

VS.

CAL-SURANCE ASSOCIATES, INC., etc., et al.,

Defendants/Appellees/Cross-Appellants.

CAL-SURANCE ASSOCIATES, INC., etc., et al.,

Defendants/Third-Party-Plaintiffs/Appellees/Cross-Appellants,

VS.

VICKERS, RIIS, MURRAY & CURRAN,
a partnership, et al.,

Third-Party Defendants/Appellants

Appeal from the United States District Court
for the Central District of California

The Honorable Marianna R. Pfaelzer, Judge

APPELLANT'S OPENING BRIEF

PRELIMINARY STATEMENT

This appeal arises out of the competing claims by three named insureds to $300,000 worth of $1,500,000 in insurance proceeds resulting from the sinking of a dredge. The District Court awarded the disputed portion of the proceeds to the named-insured plaintiff below on the sole basis that the three named insureds had agreed that the $300,000 would be paid to plaintiff. This appeal is based upon the fact that the District Court's findings on the pivotal issue of agreement by one of the three claimants are not supported by *any evidence*. Indeed, at final argument, the District Court acknowledged that:

> "There isn't a shred of evidence anywhere in this trial that [the named insured claimant] ever agreed to anything."

—o—

STATEMENT OF THE CASE[1]

A Mexican dredging company ("Dragados", plaintiff below, appellee here) entered into a written contract for the purchase of a dredge (the "*Long*") from an American dredging company ("BR/Bean", earlier called B. R. Dredging; third party defendant, appellant here). The purchase price was $1,200,000 and Dragados paid $80,000 down. Prior to the time Dragados and BR/Bean entered into the contract and at all times thereafter up to the sinking, the *Long* was subject to a first preferred ship mortgage (called a "fleet mortgage") given by BR/Bean

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[1] Digested from those findings which are not disputed here

to American National Insurance Company ("ANICO", third party defendant, not appellant here). The mortgage covered several of BR/Bean's vessels, was used as the basis of an ongoing line of credit between BR/Bean and ANICO and required BR/Bean to maintain insurance on the fleet, with ANICO as a named insured.

The contract of sale contemplated that the *Long* would first be towed from the last place of use by BR/Bean across the high seas to the place where Dragados intended to use it. It also provided that title would not pass from BR/Bean to Dragados until the trip was complete. Prior to the tow, Dragados and BR/Bean (but not ANICO) agreed to obtain a policy of insurance for $1,500,000 to cover the *Long* during the tow and to list Dragados, BR/Bean *and* ANICO as named insured "as their interests may appear." It is the proceeds of this policy which are in dispute here.

After the *Long* was lost, Dragados cancelled the contract of sale and, in proceedings commenced by the Mexican government to determine who was to be responsible for the costs of removing the wreck, denied any ownership interest in the *Long*.

The underwriters paid the full policy amount $1,500,000 less a small retention) to Cal-Surance (defendant and third-party plaintiff), the broker which had originally obtained the policy. After receiving a letter from BR/Bean's attorney asserting on behalf of BR/Bean *and* ANICO a claim to the entire $1,500,000 proceeds, Cal-Surance ultimately decided to disburse the entire proceeds to ANICO which, in turn, directed Cal-Surance to pay approximately one-half of the proceeds to BR/Bean as part of their ongoing line of credit.

Dragados later discovered that Cal-Surance had disbursed the proceeds and filed its Complaint below. Cal-Surance, in turn, brought a third-party complaint seeking indemnity from BR/Bean, ANICO and also from the attorney for BR/Bean who had authored the letter claiming entitlement by BR/Bean and ANICO to 100% of the proceeds ("Vickers/Murray," third-party defendant). Vickers/Murray, in turn, filed its third-party cofplaint seeking indemnity from Dragados, BR/ Bean and ANICO.

After trial, the District Court entered judgment in favor of Dragados and against Cal-Surance on the underlying Complaint. It then entered judgment for indemnity in favor of Cal-Surance and against BR/Bean and Vickers/Murray (but not against ANICO) and, again in turn, entered judgment for indemnity in favor of Vickers/Murray and against BR/Bean (but not ANICO). Therefore, the full weight of the District Court's decision that the three named insureds agreed that Dragados was to receive $300,000 of the $1,500,000 proceeds has fallen upon BR/Bean and includes: $298,343.80 in principle, and $380,593.39 in prejudgment interest, as well as the attorneys' fees of Cal-Surance.

—o—

ISSUE PRESENTED

But for the District Court's finding that all three named-insureds had agreed that Dragados would receive a $300,000 share of the proceeds, Dragados would not have recovered on its underlying Complaint. Therefore, if those findings are not supported by substantial evidence, the underlying judgment must fall and, with it, the judgments of indemnity.

The narrow issue, therefore, is whether the District Court's finding that ANICO agreed that Dragados was to receive $300,000 of the proceeds (Findings No. 23 and 24) were supported by substantial evidence. *ASARCO, Inc. v. Occupational and Health Administration*, 746 F.2d 483, 490 (9th Cir. 1984) [citing *American Textile Manufacturers Institute v. Donovan*, 425 U.S. 490, 522, 101 S.Ct. 2478, 2497, 69 L.Ed. 2d 185, 210 (1981)].

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ARGUMENT

As mortgagee, ANICO was one of the three named insureds on the subject insurance policy. In Finding No. 23, the District Court concludes that, "The intent of the insureds . . . was that . . . $300,000 covered the interest of Dragados. . . ." There was no testimonial or documentary evidence (of *any* sort) received from ANICO's personnel or files. Indeed, there was no testimonial or documentary evidence received from Dragados (or the remaining parties) regarding any alleged agreement by ANICO.

Faced with this total lack of evidence regarding ANICO's intent or agreement, Dragados presented to the District Court, three years after closing argument, Finding No. 24 which attempts to shift Dragados' burden of proof on the issue of ANICO's alleged agreement. Dragados made this belated attempt to provide evidence where there was none by having the District Court base its finding of ANICO's intent on the *absence* of credible evidence of what ANICO intended (Finding No. 24(a) and (d)). Dragados' burden of demonstrating the existence of an

agreement cannot be met with the *absence* of evidence. If Dragados does not make its prima facie case-in-chief, no rebuttal evidence is necessary.

Finally, the District Court made its analysis of the case exquisitely clear when, at closing argument following eight days of trial,[2] it stated:

> "And if the mortgagee [ANICO] hadn't agreed, then Dragados doesn't get anything."

and

> "There isn't a shred of evidence anywhere in this trial that ANICO ever agreed to anything."

and

> "I don't think you can inpute anything to ANICO on this record."
>
> Reporter's Transcript for March 17, 1982, p. 1084, lines 8 and 9, p. 1117, lines 18 and 19, and p. 1143, lines 15 and 16.

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CONCLUSION

Because the question of agreement by Dragados and BR/Bean *and* ANICO as to distribution of the insurance proceeds is the linchpin supporting the District Court's judgment, and because that linchpin must fail for lack of *any* evidence that ANICO ever agreed to or intended anything, the judgments must be reversed and the case re-

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[2] Presumably, the District Court's understanding of the state of the evidence was more complete at this juncture than it was three years later when it signed the findings.

manded to the District Court for a new trial of Dragados' claims against Cal-Surance and, of third-party indemnity claims against BR/Bean. (No appeal having been taken from the judgment dismissing all claims against ANICO, that judgment is now final. Obviously, ANICO can be compelled to provide evidence of its understanding, intention and agreement, if any, as a non-party witness). At the re-trial, presumably BR/Bean will argue that Dragados was fully aware of ANICO's position as holder of the first preferred fleet mortgage (see Finding No. 16 here) and that interpretation of the phrase "as their interests may appear" should be guided by the following language:

> "The words 'as their interest may appear' in insurance policies has been before the courts repeatedly. They refer to debts owed by the insured. When a mortgagee is so designated, the clause, usually referred to as 'the open mortgage clause' means that the insurer will pay the mortgage 'to the extent of his lien or charge upon the premises at the time of the loss.'" *Eagle Star & British Dominions v. Tadlock,* 22 F. Supp. 545, 547 (1938).

Respectfully submitted,

MUSICK, PEELER & GARRETT

By JAMES B. BERTERO
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